Canada. Parliament. Senate.
Standing Committee on Miscellaneous Private Bills
Proceedings

First Session—Twenty-sixth Parliament

1963

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING COMMITTEE
ON

MISCELLANEOUS PRIVATE BILLS

To whom was referred the Bill S-32, An Act to amend the Marriage and Divorce Act.

The Honourable PAUL H. BOUFFARD,
Chairman.

No. 1—3

THURSDAY, NOVEMBER 7, 1963.—Dec. 12

Statement by the Honourable Jean-François Pouliot, Q.C.

APPENDIX

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1963

29689-7—1

THE STANDING COMMITTEE
on
MISCELLANEOUS PRIVATE BILLS

The Honourable Paul H. Bouffard,
Chairman

The Honourable Senators

Aseltine,
Baird,
Beaubien (*Bedford*),
Beaubien (*Provencher*),
Belisle,
Boucher,
Bouffard,
*Brooks,
Choquette,
Connolly (*Halifax North*),
(*Halifax-Nord*),
Connolly (*Ottawa West*),
(*Ottawa-Ouest*),
Croll,
Dupuis,
Farris,
Hayden,
Hnatyshyn,
Hollett,
Horner,
Hugessen,
Lambert,
Macdonald (*Cape Breton*),
(*Cap-Breton*),
*Macdonald (*Brantford*),
Monette,
Pouliot,
Quart,
Reid,
Roebuck,
Stambaugh,
Sullivan,
Taylor (*Westmorland*),
Thorvaldson,
Tremblay,
Walker,
Willis—(32).

35 Members (Quorum 7)
*Ex officio member

LE COMITÉ PERMANENT
des
BILLS PRIVÉS

L'honorable sénateur Paul-H. Bouffard,
président

Les honorables sénateurs

35 membres (Quorum 7)
*Membre d'office

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, October 9th, 1963.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Pouliot, seconded by the Honourable Senator Stambaugh, for second reading of the Bill S-32, intituled: "An Act to amend the Marriage and Divorce Act".

After debate, and

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Pouliot moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Committee on Miscellaneous Private Bills.

The question being put on the motion, it was—

Resolved in the affirmative".

J. F. MacNeill,
Clerk of the Senate.

29689-7—1½

MINUTES OF PROCEEDINGS

WEDNESDAY, October 23, 1963.

Pursuant to adjournment and notice the Standing Committee on Miscellaneous Private Bills met today at 4.00 p.m.

Present: The Honourable Senator Bouffard, *Chairman*; Baird, Boucher, Connolly (*Ottawa-West*), Dupuis, Pouliot and Stambaugh.—7.

In attendance: Mr. E. Russel Hopkins, Law Clerk and Parliamentary Counsel. The Official Reporters of the Senate.

Bill SD-32, An Act to amend the Marriage and Divorce Act was considered.

On Motion of the Honourable Senator Dupuis, it was Resolved to report recommending that authority be granted for the printing of 1,000 copies in English and 1,000 copies in French of the Committee's proceedings on the said Bill.

On Motion of the Honourable Senator Pouliot, it was Resolved to postpone the further consideration of the Bill to Thursday, October 31st, 1963, at 9.30 A.M. in room 356-S.

Attest.

Gerard Lemire,
Clerk of the Committee.

THURSDAY, November 7, 1963.

Pursuant to adjournment and notice the Standing Committee on Miscellaneous Private Bills met this day at 10.30 a.m.

Present:—The Honourable Senators: Bouffard (*Chairman*), Aseltine, Baird, Dupuis, Hnatyshyn, Horner, Hugessen, Monette, Pouliot, Stambaugh and Taylor (Westmorland).—11.

In attendance:—Mr. E. Russell Hopkins, Q.C., Law Clerk and Parliamentary Counsel, the Official Reporters of the Senate.

Bill S-32, An Act to amend the Marriage and Divorce Act was read and considered.

The Honourable Senator Pouliot, sponsor of the Bill, was heard and questioned with respect to the said Bill.

The Chairman informed the Committee that he would request Mr. R. Bedard, Associate Deputy Minister of Justice, to appear before the Committee at some future date, to present the views of the Department of Justice with respect to the Bill.

On Motion of the Honourable Senator Aseltine it was Resolved to print as an appendix an "Extract from the Senate *Hansard* of October 31st, 1962".

At 11.45 a.m. the Committee adjourned to the call of the Chairman.

Attest.

D. Jarvis,
Clerk of the Committee.

THE SENATE

STANDING COMMITTEE ON MISCELLANEOUS PRIVATE BILLS

EVIDENCE

OTTAWA, Wednesday, October 23, 1963.

The Standing Committee on Miscellaneous Private Bills, to which was referred Bill S-32, to amend the Marriage and Divorce Act, met this day at 4.15 p.m.

Senator Paul H. Bouffard (*Chairman*) in the Chair.

The committee agreed that a verbatim report be made of the committee's proceedings on the bill.

The committee agreed to report recommending authority be granted for the printing of 1,000 copies in English and 1,000 copies in French of the committee's proceedings on the bill.

The committee then adjourned until Thursday, October 31, 1963 at 9.30 a.m.

OTTAWA, Thursday, November 7, 1963.

The Standing Committee on Miscellaneous Private Bills to which was referred Bill S-32, an Act to amend the Marriage and Divorce Act, met this day at 10.30 a.m.

Hon. PAUL H. BOUFFARD (*Chairman*), in the Chair.

The CHAIRMAN: Honourable senators, the question to be decided by the committee is whether this matter is of federal jurisdiction or of provincial jurisdiction. If it concerns marriage itself, it is under federal jurisdiction; if it concerns civil rights, it is under provincial jurisdiction. That is what we have to consider and decide.

As Senator Pouliot did not take the opportunity in the house to explain his bill and his point of view, I think it would be only fair that he do so now. We have reserved this morning to hear Senator Pouliot on the matter.

I would like him to address the committee right now and, later on, at other meetings, if it meets with the consent of the committee we will have some other people come and testify and give their opinion as to whether this legislation is of federal or provincial jurisdiction.

Senator POULIOT: Mr. Chairman and honourable senators, in the first place I intend to quote parts of section 91 and section 92 of the British North America Act, 1867. I would ask you to note how many times the words "exclusive" and "exclusively" are mentioned. Section 91 says:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the

Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive—

Note the word "exclusive" occurs there—

Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

. . .

26. Marriage and Divorce.

. . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

What I read previously referred to the exclusive jurisdiction of the Parliament of Canada. This section 92 deals with the exclusive powers of provincial legislatures and says:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say,—

. . .

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

Apparently there is a contradiction there. I will explain it, according to the jurisprudence.

There was an interesting case in 1912. It was a bill sponsored by Mr. Brown, I think, in the House of Commons, concerning the solemnization of marriage. There was a lengthy discussion about it and the matter was submitted by the Department of Justice to the Supreme Court of Canada to decide whether the Parliament of Canada had any right to legislate about the solemnization of marriage.

In the Supreme Court Reports of 1912 there is a lengthy judgment of the Supreme Court of Canada with the opinions of all the judges and also the arguments of the lawyers on both sides. The Supreme Court decided that the bill was not constitutional because it was not within the jurisdiction of the Parliament of Canada, as the solemnization of marriage was provincial, exclusively provincial.

Here I have a resume or summary of the judgment, which is reported in Olmsted's "Decisions of the Judicial Committee of the Privy Council", Vol. 1, page 650.

I will not read the whole judgment. The reference is 1912. A.C. p. 880. It has been summarized here. It says:

Under sections 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the provincial legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract.

That is not obscure. It is pretty clear, when we read it with care. It means, on the one hand, that marriage belongs to the Parliament of Canada, marriage and divorce; and, on the second hand, that only the solemnization of marriage is exclusively belonging to provincial jurisdiction.

There has been confusion on account of the subsection concerning the civil right, but it is unfortunate that the Constitution has been drafted in such a manner, in certain clauses of it, that it has created confusion in the minds of those who have to interpret it.

To summarize, sections 91 and 92 of the B.N.A. Act as interpreted by the Privy Council, mean that marriage and divorce belong exclusively to the Parliament of Canada, with one exception, an exception concerning the celebration of marriage—the performing of the ceremony. That constitution was drafted by English-speaking and French-speaking Canadians. What is important to note is that the distinction they made was evidently based on the Civil Code which had come into force on August 1, 1866, 11 months before the B.N.A. Act came into force. So the lawmakers of the time knew from the Civil Code what referred to the solemnization of marriage.

The fifth title of the Civil Code starts at article 115, concerning the qualities and conditions required for contracting marriage. Article 185 concerns the dissolution of marriage. It is the last article of the fifth title. The articles concerning the solemnization of marriage are in chapter 7, entitled "Of the Formalities relating to the Solemnization of Marriage". It commences at article 128 and ends at article 135. It means that the part concerning the solemnization of marriage in the Civil Code is very small compared to what relates to marriage. The sixth title refers to separation from bed and board, and contains thirty-two articles, from article 186 to article 217 inclusive. Referring to my previous remarks, when the B.N.A. Act was drafted and before it was adopted, the Fathers of Confederation knew very well what the celebration of marriage meant in the Code. They had it before them, and it was the law of the land. When they mentioned it in the Constitution as belonging to the exclusive jurisdiction of the provinces, they meant what concerned the officer celebrating the marriage and the notices that were given for the celebration of marriage, and so on, but it is very short compared to the numerous other articles concerning marriage.

The view taken by the Supreme Court was that everything concerning marriage belonged to the Parliament of Canada, with one exception, that of solemnization, which belonged to the provinces. I will quote the view held by Mr. Justice Mignault in one of his books, entitled *Le Droit Parlementaire,* in which he said:

If a provincial law is not within the terms of section 92 of the B.N.A. Act, it is *ipso facto* unconstitutional and *ultra vires.*

Besides the judgment of the Privy Council on the Supreme Court reference of the Parliament of Canada, there is a memorandum, which I have quoted in the Senate, from the late Chief Justice Rinfret, who for 30 years had been on the bench of the Supreme Court of Canada, and for 10 years as Chief Justice of Canada. This memorandum was published in Senate *Hansard* on November 8, 1963. I wonder if I should read it to you or put it on record? You may wish to ask questions about it.

Senator ASELTINE: That is not a judgment?

Senator POULIOT: No.

Senator ASELTINE: It is an opinion?

Senator POULIOT: The only judgment I have mentioned in my remarks was the Privy Council judgment concerning the Supreme Court judgment about the interpretation of the two sections.

Senator DUPUIS: Concerning the solemnization of marriage?

Senator POULIOT: Concerning the solemnization of marriage.

Senator DUPUIS: Which is a provincial affair.

Senator POULIOT: Which is a provincial affair. This is a resume of what the former Chief Justice of Canada said; and if you want me to read it I will do so.

Senator ASELTINE: Put it on the record.

Senator POULIOT: Very well, I will put it on the record. It was in Senate *Hansard* of November 8, 1962.

Hon. Maurice L. Duplessis,
Q.C., M.L.A.,
Premier and Attorney General,
Parliament Building,
Quebec City.

My dear Premier,

This morning, at a conference with the special revision officers, Mr. Jean François Pouliot and Mr. Emile Delâge, N.P., strong doubts were raised concerning the legality of the amendments passed by the legislature as regards marriage, separation from bed and board and marriage covenants.

It was represented that, with the exception of the 1903 amendment to article 130 C.C. for the publication of banns in the case of persons belonging to the Jewish faith which forms part of chapter entitled "Of the Formalities relating to the Solemnization of Marriage", the sixteen other amendments respecting marriage and separation from bed and board might be illegal and ultra vires.

Apparently, articles 145, 146 and 147 C.C., as well as articles 121, 125, 138, 170, 176, 177 and 180 C.C., which are part of the Title of Marriage, would come exclusively under federal jurisdiction, and not provincial jurisdiction, in all matters concerning amendments to the original version of the 1866 civil code.

The same thing could be said of the amendments to articles 188, 192, 193, 194, 210 and 217 C.C., which are part of the Title of Separation from Bed and Board.

Sub-section 26 of section 91 of the British North America Act, 1867, gives the federal parliament an exclusive legislative authority on marriage and divorce; on the other hand, all that the same act entrusted to provincial legislatures concerning marriage, under sub-section 12 of the following section 92, is the exclusive power to legislate in relation to the "solemnization of marriage in the province".

It was also represented, for the same reasons, that the legislature has gone beyond its powers in amending several articles of the title "Of marriage covenants and of the effect of marriage upon the property of the consorts."

If there were a basis for the serious doubts thus raised, it would be the original version of 1866 of those articles amended by the legislature which would remain in force, notwithstanding the subsequent amendments which would be ultra vires, illegal and void.

The articles concerning marriage, separation from bed and board and marriage covenants are of such importance, from the standpoint of the family, and are such a delicate matter, that I consider it my duty to inform you of the objections of a strictly legal nature which were raised against the amendments passed by the legislature in these matters.

Sub-section 21, section 91, of the B.N.A. Act bestows exclusive legislative authority on the parliament of Canada in all matters pertaining to bankruptcy and insolvency; on the other hand, the exclusive powers of provincial legislatures to make laws in relation to the incorporation of companies with provincial objects, under paragraph 11 of section 92 of that act, would permit to consider as legal the provisions of section 1892 of the civil code concerning the dissolution of the company through bankruptcy, and of sections 371 and following of the civil code, with regard to the forced and voluntary liquidation of companies.

Such objections have not been raised to the many amendments made to other parts of the civil code, of which Mr. Pouliot has drawn a complete list. In addition, he indicated the source and effect of each amendment on every amended section of the civil code. The transcription of the French version of those amended sections is completed and that of the English version is almost finished.

Subject to the above-mentioned reservations, it remains for us to point out which sections must be removed from the civil code because they come under federal jurisdiction as, for instance, those pertaining to citizenship and naturalization, to maritime law, to commercial law, etc., before making the necessary corrections required by the civil code revision act, to every section of the civil code amended or not, of which a great number will have to be made also to the code of civil procedure.

Montreal December 23, 1958.

Yours truly,
(Signed) Thibaudeau Rinfret,
Reviser of the civil code.

Countersigned by the special officers,
(Signed) Jean François Pouliot, C.R.
(Signed) Emile Delâge, N.P."

* * *

"In the course of the legal studies we made over a period of years for the revision of the civil code of the province of Quebec, we noticed, not without some amazement, a general and complete lack of interest in the close relationship that exists between constitutional law and the law in all other fields.

As special officers, we worked in co-operation with the Right Honnourable Thibaudeau Rinfret, C.R., former Chief Justice of Canada, who revised the civil code and who was the first to point out to the government of the province of Quebec the inadequacy of the amendments made by the legislature to several articles of the civil code.

His letter of December 23, 1958 to the Premier and Attorney General is based on the crystal-clear text of the constitution of 1867, as interpreted by the Privy Council's jurisprudence. That is an official document which is the property of the province of Quebec. I fail to understand why it has never been produced in the legislative assembly because we feel that this warning is probably the greatest service the former Chief Justice of Canada did for the Canadian people and, especially, for his compatriots of the province of Quebec.

While we were working on the revision of the civil code, we never felt for a minute that we were working for any provincial government in particular. We just simply carried out our legal searches conscientiously

and objectively for the benefit of the province of Quebec, in the hope that sooner or later our efforts would be of some use.

Finally, it is because we are firmly convinced that law, as any other science, has a relative degree of truth that one cannot overlook, that we take the liberty of calling to your attention the enclosed letter which Chief Justice Rinfret wrote to Dr. Duplessis, on December 23, 1958, and the decision handed down by the Privy Council, in 1912, and which defines the respective jurisdictions of the federal Parliament and of the provincial legislatures on the question of marriage, both jurisdictions being exclusive. Quebec City, August 13, 1962.

(Signed) Jean-François Pouliot, Q.C.

(Signed) Emile Delâge, N.P."

I was alarmed seeing that many articles of the Civil Code had been amended by the provincial legislature of Quebec; and the B.N.A. Act did not change anything to the Civil Code itself, except that it enacted new provisions for the future amendment of the Code from what it was in 1866. Then after reading the B.N.A. Act attentively, and also the judgment of the Privy Council confirming that of the Supreme Court, I discussed the whole matter with the late Chief Justice Rinfret and with Mr. Emile Delâge, my colleague, a former president of the Chamber of Notaries, and many members of the bench and bar of my province, and even of the province of Ontario; and they realized that the amendments on the articles dealing with marriage were questionable.

I asked the same question many times in the Senate. The answers from my colleague Senator Choquette, who was Acting Leader of the Government under the last Government, and this year from Senator Ross Macdonald, who is the Leader of the Government, were the same.

Senator MONETTE: What was the answer?

Senator POULIOT: If you do not mind, Senator Monette, I will mention the question in the first place and then the answer. I have a memorandum here to explain the question. I realize that it is a difficult question and I imagine—it is pure supposition—that the confusion existed after Confederation on account perhaps of the double mandate. There were many lawmakers who were sitting both in the Parliament of Canada, in the Senate, and in the Legislature. They were the same men, at first, who had to pass legislation and they did not seem to pay much attention to the exclusivity of the power to pass legislation.

The question referred to the first seven words of section 129 of the British North America Act of 1867 about the continuance of pre-Confederation existing Laws, Courts, Officers, and so on, namely, "Except as otherwise provided by this Act".

Section 129 is another section of the British North America Act which has not been drafted clearly but its meaning is evident. It reads thus:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made;

Mr. Chairman, that is elementary, because there should not have been a lapse in the laws until new laws were enacted in virtue of the British North America Act. We needed legislation in force in the country, and this article

meant that the same legislation existed after Confederation as had been in force before Confederation—it was to continue to exist after Confederation until it was changed by the proper authority. But there was this difference, that the powers to amend the existing law were not the same.

Under the United Canada (1840-1867) the provinces had much more power than they have now under Confederation on account of the powers that had been transferred to the Parliament of Canada—they were taken away from the powers that first belonged to the provinces, and this explains the second part of section 129. You will realize that it needs to be re-drafted.

The first part of that long sentence, which is section 129, means that the law which then existed continued to be in force, just as if the Union had not been made.

And then there is the second part of the wrongly drafted sentence which reads thus:

> . . . subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

This is the drafting that I complain of. To have any meaning it should have been written as follows:

> Subject nevertheless to be repealed, abolished or altered by the Parliament of Canada according to its exclusive authority or by the Legislature of the respective province according to its exclusive authority under the Act.

The distinction made by sections 91 and 92 and the exclusiveness of the respective jurisdictions are so evident that it is impossible to come to the conclusion that in the mind of the Fathers of Confederation the provinces could not after Confederation, enact any piece of legislation which had been declared under the exclusive jurisdiction of the Parliament of Canada. It also meant that the Parliament of Canada could not pass any piece of legislation that was left solely and exclusively under the jurisdiction of the province. I am sure that you follow me.

Otherwise, section 129 would have completely destroyed the effect of sections 91 and 92. It is evident one cannot come to any other conclusion that, in the minds of the Fathers of Confederation, they said to the Parliament of Canada, "You have certain exclusive powers given to you, so mind your own business," and they said to the province, "You have definite powers, they are exclusive, and you too shall mind your own business". But that wrongly drafted section has created confusion in the minds of some lawmakers, judges, lawyers and authors too. It requires a new drafting if the act is to continue in some form or another.

The second paragraph reads thus:

> (*b*) to "the exclusive legislative authority of the Parliament of Canada" extending to marriage and divorce in virtue of subsection (26) of section 91 of the said act, with the exception of the exclusive powers of Provincial Legislatures to make laws "for the solemnization of marriage", in virtue of subsection (12) of section 92 of the said act, and
>
> (*c*) the interpretation of the said law by the Supreme Court of Canada and the Privy Council on appeal from the Supreme Court of Canada in the matter of a reference to the Supreme Court of Canada

of certain questions concerning marriage, (1912 A.C., p. 880)—

Mr. Chairman, here is the first question I asked in the Senate:

> Did the Government receive any formal request from any province or any specific representation from anyone to the effect that the British North America Act of 1867, should be amended by repealing subsection (26) of section 91 of the said act?

I will try to make it clear. According to the Constitution, marriage and divorce belong to the Parliament of Canada. On account of the legislation that had been passed by the provinces, I wanted to know if anyone had made any representation to have the British North America Act amended—by Westminister, naturally—to remove subsection 26 of section 91, meaning by that giving to the provinces full jurisdiction about marriage and divorce, in accordance with the stipulation of the subsection concerning civil rights which should belong to the provinces. It is to bring some common sense into that kind of legislation.

Senator DUPUIS: Mr. Chairman, perhaps it would save a lot of time for the sponsor of the bill if we could get him to discuss only section 1A of the Marriage and Divorce Act, as shown in the bill before us. It reads, in part, as follows:

> 1A. Married women shall have the same rights as unmarried women for the sale and alienation of immoveable property.

I submit that it would help if the sponsor of the bill would discuss that question only, as to who had the right to dictate, what is the law which governs the status of the unmarried women as far as the sale and alienation of immoveable property is concerned. Of course, that is the bill which the honourable senator has.

The CHAIRMAN: I can understand your point of view, of course. On the other hand, Senator Pouliot believes that the word "marriage" in the B.N.A. Act contains not only the fact of being married, not only the existence of the conditions which permit two persons to marry, but he thinks that marriage also concerns all the effects that it may have over property and civil rights.

That is why I did not interrupt him and allowed him to go ahead, to try to demonstrate to the committee as to whether this word "marriage" incorporates all the powers that the spouse may act upon after marriage. That is one point. I quite understand your question.

Senator DUPUIS: May I say, in answer, that this committee has no power to amend the B.N.A. Act.

The CHAIRMAN: That is so.

Senator DUPUIS: As regards the question of women who own property and who can sell or alienate that property, it is in the B.N.A. Act, section 92(13), which shows clearly that matters affecting the alienation and sale of property belong to the province.

The CHAIRMAN: That is to say, the sale of property of a married woman falls under the civil rights that belong to the provinces. That is the question we have to decide.

Senator POULIOT: Honourable senators, I am in the hands of the committee. I can go on with my explanation of the bill, if you wish.

I agree with Senator Dupuis that unmarried women have the same rights as men and widows; the difference is for married women. There has been such a clamour from a certain group to the effect that women should have the right to dispose of their real estate property without asking for the permission of anybody, that I have brought this legislation to regulate that position.

Senator BAIRD: You say that all other provinces have this right now?

Senator POULIOT: Yes. I have not checked for every province, but I am under the impression that it is as you say.

The CHAIRMAN: According to the provincial legislation for each province.

Senator POULIOT: According to the provincial legislation and it dated back before Confederation.

Senator ASELTINE: A married woman is a "feme sole" in common law of the provinces.

Senator POULIOT: Yes, and they have the same power as spinsters and as men regarding the disposal of immoveable or real estate property.

I find that there was a discrimination in the Province of Quebec and I asked in the first place if anyone had come to Ottawa and had asked for an amendment to the Constitution to give the powers concerning marriage to the provinces.

The CHAIRMAN: Of course, senator, this does not concern the bill, because we do not undertake to change the Constitution and transfer marriage to provincial jurisdiction.

Senator POULIOT: Yes, sir, but I am coming to the second part of my question, which relates to the precedents for federal legislation concerning marriage. On that point, Mr. Chairman, I would ask leave of the committee to put on the record my question and the answer of Senator Choquette, which is to the same effect as the answer of Senator Macdonald (Brantford). It appears in Senate Hansard of October 31, 1962.

Hon. SENATORS: Agreed.

(*For extract from Senate Hansard of October 31, 1962, see appendix to today's proceedings*).

Senator POULIOT: That shows that nobody asked for a change of the constitution.

Then I asked another question and it was this: Were any representations made to the Government of Canada for amending the law concerning marriage and divorce, in order to grant married women's rights?

The answer was "No".

There are many precedents both in the early statutes of Canada and in the revised statutes of later years. There is naturally the act concerning marriage and divorce. It concerns the marriage of an aunt with her nephew and of a brother-in-law with a sister-in-law. Honourable senators are familiar with that point of the law. When I asked the question, honourable Senator Choquette replied that the answer was "No" to the first question and "No" to the second.

Honourable senators, I have a few notes which I would like to put on the record, if you allow me; and you may question me on the matter if you feel that you need some more explanation.

THE B.N.A. ACT, 1867:

In 1857 Sir George-Etienne Cartier sponsored a bill for the appointment of commissioners to write the first drafts of the Civil Code and of the Code of Civil Procedure of Lower Canada. Three commissioners were appointed two years later, in 1859. They had to do their work in great haste in order to complete it on time for the Quebec Conference which took place in 1864. It was at that conference that the so-called Quebec Resolutions were drafted. They were the first draft of the British North America Act of 1867. In virtue of section 92 of that Act

paragraph (13), "Property and Civil Rights in the Province" is under the exclusive jurisdiction of the provincial legislatures, with the following reservation:

In virtue of section 91 of the same act, paragraph (26), "Marriage and Divorce" are under the exclusive jurisdiction of the Parliament of Canada, with the following exception: In virtue of section 92 paragraph (12), "The Solemnization of Marriage in the Province" is under the exclusive power of provincial legislatures.

It is to be noted that the Civil Code of Lower Canada had been in force since August 1 of the previous year (1866).

Therefore, the Fathers of Confederation knew the contents of the Civil Code nearly one year before the B.N.A. Act came into force.

INTERPRETATION OF THE B.N.A. ACT, 1867, BY THE PRIVY COUNCIL:

In 1912 the Supreme Court of Canada and the Privy Council have decided that paragraph (12) of section 92 "operates by way of exception to the exclusive jurisdiction as to its validity conferred by paragraph (26) of section 91 upon the Dominion". Those most important provisions of sections 91 and 92 of the B.N.A. Act and those judgments of the highest tribunals about the jurisdiction respectively exclusive concerning Marriage and Divorce have been ignored by all the provincial legislatures of Canada for nearly a century.

To conclude, the Parliament of Canada and the provincial legislatures have entirely different fields of jurisdiction and, when they by-pass the scope of their own field, such legislation is invalid and null.

ARTICLES OF THE CIVIL CODE ON MARRIAGE IN THE COLLATERAL LINE (1866):

Chapter I of Title V of Book I of the Civil Code, entitled "Qualities and Conditions Necessary for Contracting Marriage" contains 13 articles (115 to 127 inclusive).

Any amendment to any one of those articles is under federal jurisdiction.

Articles 125 and 126 read as follows:

125. In the collateral line, marriage is prohibited between brother and sister, legitimate or natural, and between those connected in the same degree by alliance, whether they are legitimate or natural.

126. Marriage is also prohibited between uncle and niece, aunt and nephew.

FEDERAL LEGISLATION ON MARRIAGE IN THE COLLATERAL LINE SINCE 1882:

With regard to that legislation concerning the marriage between in-laws, there are precedents to the effect that the Parliament of Canada has overruled the provisions of the Civil Code by permitting the marriage between a widower and the sister of his deceased wife (1882)—when Sir John A. Macdonald was Prime Minister of Canada—between a widower and his niece, the daughter of his deceased wife's sister (1890); between a widower and his niece, the daughter of a sister or a brother of his deceased wife (1923); between a widow and the brother of her deceased husband and between a nephew and his aunt, a son of a brother or sister of a deceased husband and the widow (1932).

The above mentioned enactments of the Parliament of Canada are legal and valid and they have been incorporated in the successive Revised Statutes of Canada of 1906, 1927 and 1952, chapter 176.

It is a matter of equal marriage rights for widowers and widows, brothers-in-law and sisters-in-law, uncles and nieces, nephews and aunts.

PROVINCIAL AMENDMENTS ON MARRIAGE, SEPARATION AND MARRIAGE COVENANTS:

Of the 71 articles of the title, On Marriage, the Quebec legislature has repealed 3 and amended 8. Only one of those amendments is valid because it refers to the solemnization of marriage, which is of provincial jurisdiction.

Of the 32 articles of the title, On Separation from Bed and Board, 4 have been repealed and 6 have been amended by the legislature. All those amendments are null and void because none of them pertains to the solemnization of marriage.

Of 215 articles which pertain to marriage covenants (Book II—Title IV of the Civil Code), the Quebec legislature has added 18 articles, repealed 21, changed 10 and amended 14.

Former Chief Justice Thibaudeau Rinfret jointly with the special officers for the revision of the Civil Code of the Province of Quebec have reported to the Quebec government that all those additions, repeals, changes and amendments are invalid.

CONCLUSION:

The only manner to remedy such legal shambles would be for the attorneys general of the various provinces to pray the Government of Canada to petition the British Parliament to validate the past illegal provincial amendments to the marriage laws,—if there could be any constitutional legality in such retroactivity—and, for the future, to transfer to the provincial legislatures the exclusive federal jurisdiction on marriage and divorce.

In the meantime, what prevents the champions of married women's rights to petition the Parliament of Canada to amend the marriage law legally and to their own satisfaction, as was done so successfully for the in-laws?

It could easily be done at the next session of Parliament which is due to open in May.

Honourable senators, the foregoing was written at Ottawa on February 14, 1963.

There is the whole matter before you. Since no one has a remedy for explaining a married woman's rights and nothing has been done, I believe this bill is a step in the right direction toward opening the door to the improvement of the married woman's position in law.

Thank you very much for your kindness and patience in listening to me. I have spoken to you with an open heart, and I wanted to tell you exactly what I had in mind considering this matter, which is important.

Senator DUPUIS: If I am not mistaken, according to the B.N.A. Act this is a matter for the sole jurisdiction of the province. As I understand it Madame Kirkland-Casgrain, by reason of a study of the law on this question in Quebec has brought the matter before the legislature, and the effect of that would be

to bring the same result according to the B.N.A. Act. I do not see that we can duplicate what the Province of Quebec has already done.

Senator POULIOT: When did she do it?

Senator DUPUIS: I don't know.

Senator POULIOT: She has not done it, and nobody has done anything yet; and they realize perfectly well that they have no jurisdiction whatever. Madame Casgrain is crying in the wilderness.

Senator STAMBAUGH: Might the Department of Justice have any opinion that would be of any value? Even if this bill were passed would it have any jurisdiction over Quebec?

The CHAIRMAN: We have planned to call Mr. Bedard, Associate Deputy Minister of Justice, to come before the committee and give his opinion as to the valadity of the provincial legislation and whether the federal Government would have the right to pass legislation as proposed in the present bill. There is one difficulty about that. I spoke to the Minister of Justice, Mr. Chevrier, about it, and he was quite agreeable. Yesterday he told me that he has no objection to Mr. Bedard coming before the committee, but it is not usually done in the case of a private bill. It is usually done in the case of a public bill proposed by the Government. I intend to take the matter up with Mr. Bedard during the course of this week. In fact, I tried to get in touch with him this morning, but was unable to do so. I would like him to come before the committee and express his opinion as to whether he feels this is a matter of provincial jurisdiction or federal jurisdiction.

Senator DUPUIS: Was Maurice Ollivier approached about this bill?

The CHAIRMAN: I have not approached him at all. I do not know if anyone else has. Is it the wish of the committee to have expressions of opinion from people who are competent to do so? I certainly hope that we can get Mr. Bedard to testify before the committee. We could also have the deans of the law faculties from the various universities in Quebec, as well as others, to testify.

Senator HUGESSEN: Mr. Chairman, with regard to Mr. Bedard, I understand he is in the Department of Justice.

The CHAIRMAN: Yes.

Senator HUGESSEN: If Mr. Bedard appeared before the committee and gave an opinion, would he be giving his personal opinion or would he be expressing the formal opinion of the Department of Justice?

The CHAIRMAN: I think in the case of a bill of this kind he would give his personal opinion. I do not think it would be the opinion of the department, because it is not a matter brought before Parliament by means of a public bill.

Senator HUGESSEN: In other words, it would be just the personal opinion of a member of a federal department?

The CHAIRMAN: Yes. I do not think he would give the opinion of the Department of Justice. However, when I see Mr. Bedard I shall find out exactly what he is going to do when he comes before the committee. I shall ask him whether he will be giving an opinion of the department or his own opinion. I do not know yet what he is going to do, but I intend to communicate with him today or early next week, and I will get him to come and tell the committee in what capacity he comes.

Senator BAIRD: Would his opinion be of any use if he came in a private capacity? We do not want his private opinion, do we?

The CHAIRMAN: Well, he is a man of very good standing. He is a sound lawyer, and he is Associate Deputy Minister of the Department of Justice. No doubt his opinion, even if it were a personal opinion, would be of value.

Senator POULIOT: He is a professor.

The CHAIRMAN: Yes, he is a professor at the University of Ottawa.

Senator HUGESSEN: I should have thought in a matter of this kind, when the Senate is considering a bill in which an important constitutional point arises, that the Senate had the right to ask the Department of Justice for its opinion as a department.

The CHAIRMAN: I certainly would feel the same way. When I first saw the Honourable Mr. Chevrier about it he was absolutely of the opinion that Mr. Bedard could come before our committee and give the opinion of the department on the question, and it was only last night that he told me he had learned within the last few hours that usually they do not give an opinion in the case of a private bill. However, I am going to insist upon Mr. Bedard coming here and giving the opinion of the department on a bill of such importance where the only question is whether or not it is constitutional.

Senator POULIOT: Mr. Chairman, if you allow me, the bill sponsored by Mr. Brown in 1912 was, from the point of view of procedure, the same as the bill I am sponsoring now. It was a bill sponsored by a private member, and the Minister of Justice took it to the Supreme Court and to the Privy Council to have a ruling on it.

The CHAIRMAN: Yes, but did the the department send one of its officers to give its opinion before the committee? I am going to seek an opinion from the Department of Justice, if I can, before the next sitting; that is, if it is the wish of the Committee that I do so.

Senator STAMAUGH: Mr. Chairman, I would like to ask Senator Pouliot whether he believes that this bill is unconstitutional.

Senator POULIOT: I honestly believe that it is constitutional; otherwise I would never have sponsored it.

Senator STAMBAUGH: I thought you said it was very similar to the one of 1912 that had been declared unconstitutional. That is why I asked that question.

Senator POULIOT: I believe the bill before the committee is surely constitutional and sound for the reasons that I have given to you. It was only the procedure which was similar; the subject matter is entirely different.

I am not infallible but that is my very deep and sincere conviction, after having studied the matter not only with the late Chief Justice Rinfret but with many leading members of the bench and bar; moreover, I must add without mentioning names that I have the support and encouragement of very important members of the bench and bar.

The CHAIRMAN: The bill is extremely important because, as a matter of fact, if all relations as to civil rights between men and women who get married fall exclusively under federal jurisdiction you can see what a tangle would arise. If such was the decision all contracts of marriage that have been celebrated in the past hundred years would be invalid and could be attacked. I think this is such an important question that we should deal with it with the utmost care. I do not feel it is a bill we can pass without thinking too much about. It is an extremely serious matter. It would mean that at least 400 to 500 articles of the civil code could disappear—all those articles concerning community of property, separation from bed and board, separation of property.

Senator HUGESSEN: Mr. Chairman, I gather the position under section 129 would be that those provisions which were already in the act at the time of Confederation would remain, but any subsequent amendments to these articles made by the legislature would be declared null and void. Is that right?

The CHAIRMAN: Yes. Another viewpoint from which it can be looked upon is this: marriage is certainly a federal matter as to who can marry, what relationship there should be between the two people who want to get married.

That is under exclusive federal jurisdiction; there is no doubt about it. As to what is going to be the status of properties and the rights of women and men in so far as their property is concerned, that is certainly a matter of civil rights. I do not think there is any doubt about that. Provincial jurisdiction in that regard has been accepted for the last hundred years. I have no doubt that federal jurisdiction, if it was to decide that it should overlap provincial legislation to get a complete setup on marriage, could pass ancillary legislation that would affect the Civil Code. But that would be a matter for the Government to decide, whether it feels it should exercise its full jurisdiction over marriage, that it should overlap the Civil Code in the field of civil rights and property rights in the province. It has not done so up to the present time, and I ask whether it is proper for us to do it? That is one thing the committee has to decide.

Senator POULIOT: If you will permit me, Mr. Chairman and honourable senators, there have been many complaints of federal encroachment upon provincial rights but this time it is provincial encroachment upon federal rights. To give you an idea of the scope of the matter, in virtue of the Civil Code of Quebec, 1866, as it was adopted then, it read as follows:

> As it relates to bed and board Separation renders the wife capable of suing and being sued and of contracting alone for all that relates to the administration of her property.

This is for the administration of her property, but for all acts and suits tending to alienate her immoveable property she had to require the authorization of a judge. That was the law that existed until the article was changed. That article was amended in 1875, replaced in 1888, amended again in 1920 and replaced again in 1930-31 by the Quebec legislature, and now it reads thus:

> 210 CC The separation confers upon the wife full civil capacity to act without the necessity of marital or judicial authorization.

If the provincial legislature had no jurisdiction to pass those amendments, it means that all that has been done without authorization by separated wives for the alienation of their real estate is null and void. You can see the disaster that would follow, and it is probably on account of such a magnitude of difficulties that the matter has been left under the bucket and that nobody has drawn the attention of anyone about the whole matter. It is so serious that from the time that the memorandum was sent by Chief Justice Rinfret to the Prime Minister and Attorney-General of Quebec, late in 1958, the legislature, since more than five years, has not passed a single amendment concerning marriage. They are afraid to touch it because they know very well they have no jurisdiction whatever and what is said by the protagonists of women's rights in the Province of Quebec is just pure bluff, because they are not taking any action to legalize the whole matter.

Senator STAMBAUGH: You do not have to convince me of the rightness of the bill. I think it is very fair but I am surprised to learn that the situation in regard to this matter is not the same in Quebec as in other provinces.

The CHAIRMAN: It has never been.

Senator STAMBAUGH: I do think we should have some advice from the Department of Justice. We should not pass this bill and then find it has no effect. It would be a sort of insult to the Legislature of Quebec.

The CHAIRMAN: If it is the wish of the committee I shall certainly make it my duty to have Mr. Bedard or some other officer of the Department of Justice come here and state whether or not this legislation is valid.

Senator MONETTE: Mr. Chairman, do we have the opinion of the law clerk of the Senate upon this?

The CHAIRMAN: Not yet. However, Mr. Hopkins is going to give us his opinion on the constitutionality of the bill. I think we are entitled to have his opinion on it.

Senator MONETTE: The sponsor of this bill did not explain the law involved when he introduced the bill in the Senate. It will have to go back there to be discussed on that point.

The CHAIRMAN: Yes, of course it will have to go back to the Senate.

Senator MONETTE: In passing, may I give shortly my view on this. This is the rule of 1912. I have not covered this point before as the honourable senator has done. My impression is that this decision had a bearing on the validity of marriage, not on the power of the parties civilly to do this or to do that, to make such a contract or not make such a contract. I find that in the decision given and reported in Olmsted's "Decisions of the Judicial Committee of the Privy Council", Vol. 1 at p. 656, Viscount Haldane, L.C., is reported as follows:

> In the course of the argument it became apparent that the real controversy between the parties was as t owhether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91.

The CHAIRMAN: That is it.

Senator MONETTE: From that we gather that the whole discussion seems to indicate they were discussing points as to the validity of marriage—

The CHAIRMAN: Celebration.

Senator MONETTE: Yes, the celebration or a condition of validity. The power given to the federal Parliament was the power given as to the validity of the contract.

After expressing the views of some of the lawyers who argued on different points, Viscount Haldane continued:

> Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial Legislature the exclusion power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract.

I should not like to take up more time at the moment. It appears that what they had to discuss in relation to what was proposed by counsel on both sides was as to whether the conditions of validity were rightly to belong in one part to the federal and in one part to the provinces.

The CHAIRMAN: That is to say, that the validity of marriage depends not only upon whether a couple had the right to get married but whether they celebrated their marriage within the provisions of the provincial law. If they had missed that, the provincial law would apply and the marriage might not be valid if it had not been solemnized according to the provincial legislation.

Senator MONETTE: When we come to section 91 it appears at first sight that Viscount Haldane and the Privy Council were not too wrong because section 91 says that it shall be lawful for the Queen exclusively to make laws on certain classes of subjects—and item No. 26 is "Marriage and Divorce".

Marriage and divorce, associated with divorce, seems to bring into relation the question of the validity of the marriage and the validity of getting out of marriage by way of divorce.

Honourable senators, I do not contend that my opinion will remain that way, but for the moment I am very much inclined that way. Therefore it will be well to have the opinion of the law clerk of the Senate, as suggested by you, Mr. Chairman, and by Senator Pouliot, and to have the opinions of other lawyers of importance.

As you have said, Mr. Chairman, the matter is very important. Its importance has been recognized for not less than a century. It may be that before changing the law we should open our two eyes and look very deeply into this whole matter.

In the meantime may I take it that this bill will be returned to the Senate where all senators will receive an explanation from the sponsor, and also have the benefit of the opinion of counsel? We are but a few in this committee, and generally a bill is explained in the House.

The CHAIRMAN: This bill has been referred to the Standing Committee on Miscellaneous Private Bills. It is the duty of the committee to make an inquiry and then report to the Senate after that inquiry is completed. If an officer of the Department of Justice comes and speaks for the department, stating whether he feels this bill is constitutional or not, we will have that opinion. Then we may seek the opinion of people outside the department, lawyers qualified to testify on this matter. Then, the whole inquiry will have been completed and we will make a report to the Senate.

Senator MONETTE: That is not exactly what I had in mind, Mr. Chairman. You have stated the regular procedure. When the bill was introduced the other day, Senator Pouliot refused to give an outline of the scope of the bill or its legality. So those senators who are not here today have not had an opportunity of receiving his views. I suggest that when it is sent back to the House, the procedure which avails at all times should be followed and that the proposer should explain it.

The CHAIRMAN: You know of course that a note of this inquiry is being taken by the *Hansard* reporter and the report of the committee will include all the testimony rendered before it, so that all senators may avail themselves of the opinions given before the committee.

Senator MONETTE: Does that mean the committee proceedings will be printed?

The CHAIRMAN: Yes.

Senator MONETTE: Very well, that is all right.

The CHAIRMAN: Is it your wish to adjourn now until next week?

Hon. SENATORS: Agreed.

The CHAIRMAN: In the meantime I will try to arrange for Mr. Bedard to appear before the committee.

Senator POULIOT: Thank you, Mr. Chairman and gentlemen.

The committee adjourned.

APPENDIX

Extract from Senate *Hansard* of October 31, 1962.

MARRIAGE AND DIVORCE

Inquiry as to any requests or representations for amendment of British North America Act with reference to legislative jurisdiction re marriage and divorce.

Hon. JEAN-FRANÇOIS POULIOT inquired of the Government, pursuant to notice:

Referring (a) to the first seven words of section 129 of the B.N.A. Act, 1867, about the continuance of pre-Confederation existing Laws, Courts, Officers, etc., namely, "Except as otherwise provided by this Act",

—(b) to "the exclusive legislative authority of the Parliament of Canada" extending to *marriage and divorce* in virtue of subsection (26) of section 91 of the said act, with the exception of the exclusive powers of Provincial Legislatures to make laws "for the solemnization of marriage", in virtue of subsection (12) of section 92 of the said act, and

—(c) the interpretation of the said law by the Supreme Court of Canada and the Privy Council on appeal from the Supreme Court of Canada in the matter of a reference to the Supreme Court of Canada of certain questions concerning marriage, (1912 A.C., p. 880)—

1. Did the Government receive any formal request from any province or any specific representation from any one to the effect that the B.N.A. Act, 1867, should be amended by repealing subsection (26) of section 91 of the said act?

2. If so, from whom and when?

3. In view of the Statutes of Canada:

45 V., (1882), c. 42;
53 V., (1890), c. 36;
13-14 Geo. V., (1923) c. 19;
22-23 Geo. V, (1932) c. 10;

and the Revised Statutes of Canada:

c. 105 of 1906;
c. 127 of 1927: and
c. 176 of 1952, the latter being intituled "An Act respecting Marriage and Divorce",

did the Government of Canada receive any specific representation or any formal request from anyone to the effect that the Parliament of Canada, in virtue of the exclusive legislative authority conferred upon itself by subsection (26) of section 91 of the B.N.A. Act, should repeal article 1301 of the Civil Code of the Province of Quebec and the second paragraphs of articles 1265 and 1422 of the said Code, and amend articles 179 and 180 of the said Code concerning the rights of married women in the Province of Quebec?

4. If so, from whom and when?

Hon. LIONEL CHOQUETTE: The answer to the honourable gentleman's inquiry is as follows:

1. No.
2. Answered by No. 1.
3. No.
4. Answered by No. 3.

Hon. Mr. POULIOT: It is the answer I gave last session.

Hon. Mr. CHOQUETTE: There are further details contained in the envelope which the honourable senator might not have anticipated.

Hon. Mr. POULIOT: As always, I am ahead of my time. Thank you very much.

First Session—Twenty-sixth Parliament

1963

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE

ON

MISCELLANEOUS PRIVATE BILLS

To whom was referred the Bill S-32, An Act to amend the Marriage and Divorce Act.

The Honourable PAUL H. BOUFFARD,
Chairman.

No. 2

THURSDAY, DECEMBER 5, 1963.

Statement by the Honourable the Chairman.

APPENDICES "B" "C" "D"

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1963

29691-3—1

THE STANDING COMMITTEE
on
MISCELLANEOUS PRIVATE BILLS

The Honourable Paul H. Bouffard,
Chairman

The Honourable Senators

Aseltine,
Baird,
Beaubien (*Bedford*),
Beaubien (*Provencher*),
Belisle,
Boucher,
Bouffard,
*Brooks,
Choquette,
Connolly
(*Halifax North*),
(*Halifax-Nord*),
Connolly
(*Ottawa West*),
(*Ottawa-Ouest*),
Croll,
Dupuis,
Farris,
Hayden,
Hnatyshyn,
Hollett,
Horner,
Hugessen,
Lambert,
Macdonald
(*Cape Breton*),
(*Cap-Breton*),
*Macdonald (*Brantford*),
Monette,
Pouliot,
Quart,
Reid,
Roebuck,
Stambaugh,
Sullivan,
Taylor (*Westmorland*),
Thorvaldson,
Tremblay,
Walker,
Willis—(32).

35 Members (Quorum 7)

*Ex officio member

LE COMITÉ PERMANENT
des
BILLS PRIVÉS

L'honorable sénateur Paul-H. Bouffard,
président

Les honourables sénateurs

35 membres (Quorum 7)

*Membre d'office

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, October 9th, 1963.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Pouliot, seconded by the Honourable Senator Stambaugh, for second reading of the Bill S-32, intituled: "An Act to amend the Marriage and Divorce Act".

After debate, and

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Pouliot moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Committee on Miscellaneous Private Bills.

The question being put on the motion, it was—

Resolved in the affirmative".

J. F. MacNEILL,
Clerk of the Senate.

29691-3—1½

MINUTES OF PROCEEDINGS

THURSDAY, December 5th, 1963.

Pursuant to adjournment and notice the Standing Committee on Miscellaneous Private Bills met today at 11.30 a.m.

Present: The Honourable Senators Bouffard, *Chairman;* Connolly (*Halifax North*), Hollett, MacDonald (*Cape Breton*), Pouliot, Stambaugh and Taylor (*Westmorland*).—7.

In attendance: The Official Reporters of the Senate.

Bill S-32, An Act to amend the Marriage and Divorce Act was further considered.

After a statement made by the Honourable Chairman of the Committee it was Resolved to print as appendix "B" a Memorandum to Mr. R. Bedard from the Deputy Minister of Justice E. A. Driedger; as appendix "C" a Resolution of the National Federation of Liberal Women and appendix "D" an excerpt of the *Globe and Mail* of Saturday, November 30, 1963.

After discussion and on Motion of the Honourable Senator Pouliot it was Resolved to invite Mrs. Claire Kirkland-Casgrain, member of the executive council of the Province of Quebec, to attend our next meeting of the Committee together with Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel of the Senate.

At 12.00 noon, the meeting was adjourned to December 12th, 1963, at 10.00 a.m.

Attest.

Gerard Lemire,
Clerk of the Committee.

THE SENATE

STANDING COMMITTEE ON MISCELLANEOUS PRIVATE BILLS

EVIDENCE

OTTAWA, Thursday, December 5, 1963

The Standing Committee on Miscellaneous Private Bills, to which was referred Bill S-32, to amend the Marriage and Divorce Act, met this day at 11.30 a.m.

Senator PAUL H. BOUFFARD (*Chairman*) in the Chair.

The CHAIRMAN: Honourable senators, we have a quorum, and I think we should proceed. I have to say that this morning we expected to have before us Mr. Bedard of the Department of Justice to give us the department's opinion as to whether this bill is constitutional or not. Mr. Bedard has received directions from his deputy minister to the effect that the Department of Justice does not feel that an opinion should be given by it at the present time on this bill.

The directions are a little long, and I suggest that this memorandum be printed as an appendix to the committee's proceedings of this morning. However, the deputy minister, Mr. Driedger, says:

> As I have indicated, however, there are situations where it would be quite proper and perhaps even desirable for officers of the Department of Justice to advise Parliamentary Committees. These are as follows:
>
> 1. Where a government bill is before a Committee, officers may appear to give such legal explanations of the bill or any of its provisions, as may be necessary, although it would not be proper to disclose to the Committee any advice that may have been given to the Government or a Department except with the approval of the appropriate Minister.
>
> 2. Where a legal opinion has been given to a Minister or Department and that opinion has been disclosed to a Parliamentary Committee by that Minister or Department, officers of the Department of Justice may appear to give such explanations of the opinion as may be required. It would, however, be a violation of confidence for an officer of the Department of Justice to disclose the fact that an opinion was given or the nature of that opinion.
>
> 3. Where a Parliamentary Committee has undertaken a legal study of a general nature—as for example capital punishment or the gaming laws—and has invited views, officers of the Department of Justice may appear and state views, if the Minister of Justice approves and the officer concerned is able to undertake such a task without interfering unduly with his official duties.

He concludes his letter by saying that this committee has not the qualifications mentioned in the letter, and consequently he instructs Mr. Bedard:

> If you are summoned by the Committee, it will of course be your duty to appear, but in that event your only course can be to explain the situation as I have outlined it above.

So, the Department of Justice does not want to give an opinion.

(*For text of memorandum to Mr. R. Bedard from the Deputy Minister of Justice, see appendix "B"*).

There remains our Law Clerk whom I saw this morning and who is going to give an opinion at the next sitting of the committee.

Senator Pouliot, the sponsor of the bill, said he would like Mrs. Kirkland-Casgrain invited to appear before the committee. She is a member of the executive council of the Province of Quebec, and has been quite active in women's affairs.

Senator POULIOT: And she is a lawyer.

The CHAIRMAN: Yes, she is a lawyer. Senator Pouliot would like to have Mrs. Kirkland-Casgrain invited to say what she has to say.

Senator POULIOT: It would be easy to have her here at the same time as Mr. Hopkins, our Law Clerk.

The CHAIRMAN: Yes, she could be invited to come next week. We can invite Mrs. Kirkland-Casgrain to come and give her opinion, if it is the wish of the committee to so invite her.

Hon. SENATORS: Agreed.

Senator BOUFFARD: I think we can only invite her. If she does not wish to come then that is her business. We cannot summon her.

Senator HOLLETT: Who is she?

The CHAIRMAN: She is a minister without portfolio on the executive council of the Province of Quebec.

Senator HOLLETT: Is she married or single?

The CHAIRMAN: She is married to a lawyer, Philippe Casgrain, and I think she does practice law in the Province of Quebec.

Senator CONNOLLY (*Halifax North*): You will not say whether she and her husband have the same legal opinion with respect to this matter?

The CHAIRMAN: I would not even try to investigate it.

Senator TAYLOR (*Westmorland*): I think it would be very good to have her here.

Senator POULIOT: I wonder if the committee has any objection to my filing a copy of the resolution that was passed by the National Federation of Liberal Women which supports this bill.

Senator CONNOLLY (*Halifax North*): I see no objection.

Senator POULIOT: It is signed by Mrs. Ware, the acting secretary of the National Convention of the Women's Liberal Federation of Canada, and attached is a letter from Mr. Paul Lafond who sent it to me on the letterhead of La Fédération Libérale Nationale du Canada.

There is something else I wish to say. We can dispense with hearing the officers of the Department of Justice, and I can submit much more to you in due course, but here is a newspaper article with an interview that was given to Miss Joan Munn of the *Globe and Mail* by Mr. Jean Lesage about the rights of Quebec wives. This is from the *Globe and Mail* of Saturday, November 30, 1963.

The CHAIRMAN: Is there any objection on the part of the committee to having these two documents printed as appendices to the committee's proceedings of today? The resolution of the National Federation of Liberal Women reads:

> WHEREAS a private bill is presently before the Senate of Canada to amend the Marriage and Divorce Act to permit married women to have the same rights as unmarried women for the sale and alienation of immovable property. THEREFORE BE IT RESOLVED that the National Federation of Liberal Women go on record as supporting this bill.

Senator CONNOLLY (*Halifax North*): There is no objection.

The CHAIRMAN: Is there any objection to the article from the *Globe and Mail*, Miss Joan Munn's interview with Mr. Lesage, being printed as an appendix?

Hon. SENATORS: Agreed.

—(*For text of resolution of National Federation of Liberal Women, see appendix "C", and for text of article entitled "Rights for Quebec Wives Predicted", appearing in the* Globe and Mail, *Saturday, November 30, 1963, see appendix "D"*)

Senator POULIOT: You will read that interview when it is published in the report of the committee's proceedings, and I will ask Mr. Lemire, the clerk, to be as expeditious with this report as he was with the previous one.

I might say in connection with this interview reported in the *Globe and Mail* that matters of law are so important that they cannot be decided by the shrugging of shoulders or by a wink to a pretty journalist.

The CHAIRMAN: Honourable senators, if you agree, I will adjourn this committee until Wednesday or Thursday of next week for the purpose of hearing Mr. Hopkins and Mrs. Kirkland-Casgrain, who will be invited to attend.

Hon. SENATORS: Agreed.

—The Committee adjourned.

APPENDIX "B"

DEPARTMENT OF JUSTICE

OTTAWA, December 4, 1963.

MEMORANDUM FOR: MR. R. BEDARD

FROM: DEPUTY MINISTER

You have asked me whether it would be in order for you to appear before the Senate Committee on Miscellaneous Private Bills and advise on the constitutionality of Bill S-32, "An Act to amend the Marriage and Divorce Act".

Officers of the Department of Justice frequently appear before Parliamentary Committees. Indeed, over the years I have myself appeared before Parliamentary Committees on many occasions, and particularly Senate Committees, to give such assistance as I could to the Committee. There are, however, limits beyond which it would not be proper to go.

The position is, I believe, quite clear that the Minister of Justice and Attorney General cannot be required to give legal advice to either House of Parliament or to any committee thereof. The reason for this rule is that constitutionally and historically, as well as under the express terms of the Department of Justice Act, he is the official legal adviser of the Government and the Departments thereof. Consequently, it is not his function or duty, and therefore not the function or duty of his Deputy or any other of his officers, to give legal advice to Parliament or to a Parliamentary Committee. Moreover they would find themselves in an impossible conflict of duty if they were called upon to advise a Parliamentary Committee with respect to a matter on which they have advised or may be asked to advise the Government. There is the further circumstance that legal advice given by officers of the Department of Justice or even the Attorney General of Canada would not be binding upon Parliament or any Committee of Parliament and would not in any sense be conclusive.

As I have indicated, however, there are situations where it would be quite proper and perhaps even desirable for officers of the Department of Justice to advise Parliamentary Committees. These are as follows:

1. Where a government bill is before a Committee, officers may appear to give such legal explanations of the bill or any of its provisions, as may be necessary, although it would not be proper to disclose to the Committee any advice that may have been given to the Government or a Department except with the approval of the appropriate Minister.

2. Where a legal opinion has been given to a Minister or Department and that opinion has been disclosed to a Parliamentary Committee by that Minister or Department, officers of the Department of Justice may appear to give such explanations of the opinion as may be required. It would, however, be a violation of confidence for an officer of the Department of Justice to disclose the fact that an opinion was given or the nature of that opinion.

3. Where a Parliamentary Committee has undertaken a legal study of a general nature—as for example capital punishment or the gaming laws—and has invited views, officers of the Department of Justice may appear and state views, if the Minister of Justice approves and the officer concerned is able to undertake such a task without interfering unduly with his official duties.

In the present case, I note that the bill upon which an opinion is sought is a private bill, and the case does therefore not fall within any of those mentioned above in which it would be proper to advise. Furthermore, since this measure must go to the House of Commons if it passes the Senate, the matter is one on which the Attorney General of Canada or his Deputy may be asked to advise the Government, and, as I have indicated, there would be a serious conflict of duty if such advice were now required to be given to a Parliamentary Committee.

In the circumstances, therefore, I must ask you to refrain from expressing any opinion in the matter to the Senate Committee. I appreciate that you have been asked for your personal views, but in this matter a distinction cannot be drawn between personal and official views.

If you are summoned by the Committee, it will of course be your duty to appear, but in that event your only course can be to explain the situation as I have outlined it above.

E.A.D.

APPENDIX "C"

LA FÉDÉRATION LIBÉRALE NATIONALE DU CANADA

251 rue Cooper — Ottawa — Canada — Tél: CE-6-2391

le 26 novembre, 1963.

Ci-annexé, copie du document demandé.

(Sgd) PAUL LAFOND

L'honorable Jean-François Pouliot, C.R.,
Le Sénat,
OTTAWA

WHEREAS a private bill is presently before the Senate of Canada to amend the marriage and divorce Act to permit married women to have the same rights as unmarried women for the sale and alienation of immovable property. THEREFORE BE IT RESOLVED that the National Federation of Liberal Women go on record as supporting this bill.

The above resolution was adopted at a plenary session of the National Convention of the Women's Liberal Federation of Canada.

Ottawa, October 30, 1963.

Mrs. A. C. WARE,
(Signed) A. C. Ware,
Acting Secretary.

APPENDIX "D"

THE GLOBE AND MAIL, SATURDAY, NOV. 30, 1963

Ottawa Scene

RIGHTS FOR QUEBEC WIVES PREDICTED

By JOAN MUNN

Special to The Globe and Mail

Ottawa—Married women in Quebec will soon have the same legal rights as men and single women.

Premier Jean Lesage in an interview during the federal-provincial conference said legislation to this effect will be proposed in the Speech from the Throne when the new session of the Quebec Legislature opens in January.

Will it be passed soon?

"Yes, Mrs. Casgrain will see to it," the Quebec Premier said with a grin.

Marie Kirkland-Casgrain was sworn in as Quebec's first woman cabinet minister a year ago next Wednesday. She has long been pushing for equal rights in Quebec for married women.

Mr. Lesage declined comment on a statement by Senator Jean-François Pouliot (L. Quebec) that the federal-provincial conference should stop talking "money, money, money" and instead clear up the question of jurisdiction over certain matters relating to marriage and divorce.

Under the British North America Act the Federal Government was given power over marriage and divorce. The provinces kept authority over the marriage ceremony and existing provincial statutes were allowed to stand. Sen. Pouliot contends provincial amendments of laws relating to marriage and passed after Confederation are unconstitutional.

Sen. Pouliot cited a 1958 letter written by Canada's former chief justice to the Quebec administration. In it Thibaudeau Rinfret said at least 16 amendments to the Quebec Civil Code concerning marriage and separation were illegal and ultra vires.

The whole matter should be cleared up, the senator urged, even if the provinces and Federal Government have to petition the British Privy Council to change the B.N.A. Act. He hopes to "wake up those sleeping premiers... all those Rip Van Winkles who meet together like old spinsters."

His test bill, SD-32, which has already been given second reading by the Senate, would give married women in Canada the same rights as single women to sell their own real estate holdings without the consent of their husband or, if legally separated, of a judge. Quebec is the only province in which women are denied this right.

During a meeting Nov. 7 of the Senate's Private Bills Committee, Senator Vincent Dupuis (L. Quebec) suggested Bill SD-32 was similar to what Mrs. Casgrain has proposed for the Quebec Legislature.

"I do not see that we can duplicate what Quebec has already done," said Sen. Dupuis.

"She has not done it," snapped Queen's Counsel Pouliot, "and nobody has done anything yet; and they realize perfectly well that they have no jurisdiction whatever. Mrs. Casgrain is crying in the wilderness."

Mr. Lesage, with a twinkle in his eye, said here he never comments on what Sen. Pouliot says.

The Senate committee deferred action on Bill SD-32 until it could hear the testimony of constitutional experts.

A constitutional authority here says the type of provincial amendments Sen. Pouliot has branded illegal are presumed valid until declared otherwise by a court decision. Some of the sections the senator is disputing relate not only to marriage but also to other fields such as civil and property rights which are provincial matters under the B.N.A. Act.

Senators from both parties have said privately they wish Sen. Pouliot wouldn't keep raising the topic. They felt Ottawa already has enough problems making confederation work without digging up new bones of contention.

One long-time observer of Parliament, a lawyer, said Canadian lawmakers had been managing happily for years before the senator began his constitutional fight.

"He's going to stir up a clear pond and make it muddy," said this French-Canadian lawyer. He felt the senator's stand wouldn't be popular in Quebec. And even if his rights-for-married-women bill passed the Senate, it would probably die for lack of a sponsor in the Commons.

It would cause a lot of trouble, the observer said, if our many provincial laws relating to marriage reverted back to what existed in 1867.

First Session—Twenty-sixth Parliament

1963

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE

ON

MISCELLANEOUS PRIVATE BILLS

To whom was referred the Bill S-32, An Act to amend the Marriage and Divorce Act.

The Honourable PAUL H. BOUFFARD,
Chairman.

No. 3

THURSDAY, DECEMBER 12, 1963.

WITNESS:

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel, the Senate.

APPENDIX "E"

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1963

29693-9—1

THE STANDING COMMITTEE
on
MISCELLANEOUS PRIVATE BILLS

LE COMITÉ PERMANENT
des
BILLS PRIVÉS

The Honourable Paul H. Bouffard,
Chairman

L'honorable sénateur Paul-H. Bouffard,
président

The Honourable Senators

Les honorables sénateurs

Aseltine,
Baird,
Beaubien (*Bedford*),
Beaubien (*Provencher*),
Belisle,
Boucher,
Bouffard,
*Brooks,
Choquette,
Connolly (*Halifax North*),
(*Halifax-Nord*),
Connolly (*Ottawa West*),
(*Ottawa-Ouest*),
Croll,
Dupuis,
Farris,
Hayden,
Hnatyshyn,
Hollett,
Horner,
Hugessen,
Lambert,
Macdonald (*Cape Breton*),
(*Cap-Breton*),
*Macdonald (*Brantford*),
Monette,
Pouliot,
Quart,
Reid,
Roebuck,
Stambaugh,
Sullivan,
Taylor (*Westmorland*),
Thorvaldson,
Tremblay,
Walker,
Willis—(32).

35 Members (Quorum 7)
*Ex officio member

35 membres (Quorum 7)
*Membre d'office

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, October 9th, 1963.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Pouliot, seconded by the Honourable Senator Stambaugh, for second reading of the Bill S-32, intituled: "An Act to amend the Marriage and Divorce Act".

After debate, and

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Pouliot moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Committee on Miscellaneous Private Bills.

The question being put on the motion, it was—

Resolved in the affirmative".

J. F. MacNEILL,
Clerk of the Senate.

29693-9—1½

MINUTES OF PROCEEDINGS

THURSDAY, December 12, 1963.

Pursuant to adjournment and notice the Standing Committee on Miscellaneous Private Bills met this day at 10.00 A.M.

Present: The Honourable Senators Bouffard, *Chairman;* Belisle, Farris, Horner, Macdonald (Cape Breton), Pouliot and Stambaugh. 7.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel, the Senate. The Official Reporters of the Senate.

Bill S-32, An Act to amend the Marriage and Divorce Act, was further considered.

In reply to the invitation of the Committee to appear and present her views on the Bill, the Honourable Claire Kirkland-Casgrain, Minister without Portfolio of the Province of Quebec, expressed her regrets at not being able to attend the meeting this day.

Mr. E. Russell Hopkins, who had prepared a brief, was questioned by the Honourable Senator Pouliot, sponsor of the Bill. The Honourable Senator Bouffard, Chairman of the Committee, read the conclusion stated in the brief and it was resolved to print, as Appendix "E", the said brief.

After discussion, it was agreed, unanimously, that this would be the last meeting for this Session. At the beginning of a new Session this Bill will be re-introduced, and, as and when the Committee sits again on the said Bill, the Attorney-General of each province will be invited to appear and give his opinion on the said Bill.

At 11.45 A.M. the Committee adjourned to the call of the Chairman.

Attest.

Gerard Lemire,
Clerk of the Committee.

THE SENATE

STANDING COMMITTEE ON MISCELLANEOUS PRIVATE BILLS

EVIDENCE

OTTAWA, Thursday, December 12, 1963.

The Standing Committee on Miscellaneous Private Bills, to which was referred Bill S-32, to amend the Marriage and Divorce Act, met this day at 10 a.m.

Senator Paul H. Bouffard (*Chairman*) in the Chair.

The CHAIRMAN: Mrs. Kirkland Casgrain was invited to come before the committee to testify on the bill and give her opinion on it. Mrs. Casgrain is a minister without portfolio in the Quebec Cabinet. She has written Mr. Armstrong, Chief Clerk of Committees a letter stating that she could not come, and she expressed her thanks for the honour done to her and takes this opportunity to forward her best wishes to the committee.

I wonder if this letter should be published with our report of today's proceedings which will probably be the last report the committee will make to the Senate.

Senator STAMBAUGH: No, just table the letter with the report of the committee.

The CHAIRMAN: The other person we are going to hear this morning is Mr. E. Russell Hopkins, the Law Clerk and Parliamentary Counsel, of the Senate, who is going to give his opinion as to the constitutionality of the bill. Mr. Hopkins has delivered a written opinion. I understand that nearly all members of this committee are also members of the Committee on Aging and they wish to attend the meeting of that committee this morning. What do you feel about this opinion? Do you feel it should be read before the committee, or printed in the record?

Senator POULIOT: Mr. Chairman, I would like to ask a few questions of Mr. Hopkins before he reads his statement.

The CHAIRMAN: Yes, Senator.

Senator POULIOT: Mr. Hopkins, is it your opinion that the civil law and common law in Canada derive from the British North America Act?

MR. E. RUSSELL HOPKINS, Law Clerk and Parliamentary Counsel: Yes, Senator.

Senator POULIOT: Do you think that the separation of powers or jurisdiction is definitely set as much as it can be by sections 91 and 92 of the British North America Act of 1867?

Mr. HOPKINS: Senator, the Fathers of Confederation thought that they had devised a formula which would be comparatively easy to interpret, and which would not raise difficulties, but I think their expectations were not fully realized and that a great deal of interpretation still remains as to the exact distribution of powers between the federal Parliament under section 91 and the provincial legislatures under section 92.

Senator POULIOT: That is correct, but was it the intention of the lawmakers to establish two entirely different and respectively exclusive jurisdictions, on the one hand for the Parliament of Canada, and on the other hand for the provincial legislatures?

Mr. HOPKINS: Except for the special provisions giving joint jurisdiction in certain fields, that was the intention of sections 91 and 92, I think.

Senator POULIOT: The intention of the Fathers of Confederation was expressed in this way: they told the Parliament of Canada, "Mind your own business," and they told the provincial legislatures, "Mind your own business," except in the fields of direct taxation, agriculture and immigration?

Mr. HOPKINS: Well, senator, they did not use those words, but, roughly speaking, that is correct.

Senator POULIOT: That was the lawmakers' intention, apparently?

Mr. HOPKINS: Yes, I would say so.

Senator POULIOT: Well, now, do you not think, Mr. Hopkins, that the definitions that we find in a good dictionary such as Webster's—the acknowledged dictionaries—guide us as to the meanings of words?

Mr. HOPKINS: Well, the works of eminent lexicographers are often referred to in the interpretation of statutes. There are some exceptions and there are some qualifications. I think that Maxwell's 1962 volume on the Interpretation of Statutes contains a very good comment on the dictionary meaning of words.

Senator POULIOT: Naturally, no language has attained such perfection that there will be one word for every shade of expression.

Mr. HOPKINS: That is correct, sir.

Senator POULIOT: And the same word sometimes is used in many senses?

Mr. HOPKINS: That is correct, sir, depending on the context.

Senator POULIOT: Yes, it depends on the context. In the dictionary there are several meanings given for each word and they are usually marked 1, 2, 3, 4 and 5, and sometimes the meanings are different, and there are antonyms given.

Mr. HOPKINS: Yes.

Senator POULIOT: Have you realized in reading sections 91 and 92 particularly, leaving aside completely all the exceptions such as those with respect to education and so on, there is no question of that at the present time.

Mr. HOPKINS: That is right.

Senator POULIOT: Have you taken notice of the fact that the words "exclusive" and "exclusively" are repeated often in sections 91 and 92 of the British North America Act?

Mr. HOPKINS: I have indeed, senator.

Senator POULIOT: You know it?

Mr. HOPKINS: That is right.

Senator POULIOT: Now, will you agree legally with this definition of "exclusive"? It is the meaning that may be used probably in the interpretation of the above-mentioned sections. "Exclusive" means "2. excluding or inclined to exclude others, especially outsiders". Perhaps we have a better illustration by using what is said about the word "exclude," from which the adjective and the adverb are derivated. "Exclude" strictly implies keeping out what is already outside, and it may be used in reference to persons and things. Do you think that this is the meaning that was given to the word "exclusive" and "exclusively" by the Fathers of Confederation in sections 91 and 92?

Mr. HOPKINS: I think, senator, that what I have considered and what I have taken into account would be far more evident if I were to read my opinion which I have placed before you.

The CHAIRMAN: I think it would be more just to Mr. Hopkins, whom we asked to give an opinion on the matter, if his opinion is given to the committee and then, perhaps questions could be asked.

Senator POULIOT: I have no objection to Mr. Hopkins reading his paper providing that I have an opportunity of asking him a few questions.

Senator FARRIS: Mr. Chairman, I think we are all wondering a little just what is the relevancy of these questions to the problem we have before us.

The CHAIRMAN: Of course, you know that the senator wants to get at the matter of the word "exclusive," and whether the act excludes the province from doing anything. It is a matter of interpretation. I do not know whether the committee wants the whole of Mr. Hopkins' opinion to be read, or whether it wants just his conclusions. The opinion runs to eight pages. Should we read the whole opinion, or go right away to the conclusions that he has reached on the matter pending before the committee. We could read the whole opinion and give the committee the complete background of his conclusions, or we can read just his conclusions and thus know exactly what he thinks about the whole situation.

Senator FARRIS: Even those of us who are lawyers can hardly be expected to pass on that from a single reading of the document.

Senator STAMBAUGH: Mr. Chairman, I just do not know what the lawyers would consider, but as a layman I think the conclusion is all we are interested in. The reason why he arrived at it does not interest us.

The CHAIRMAN: I am going to read the conclusions, and then it will be in the report of the committtee of today so that everyone will have the opportunity to read the whole opinion on receiving the report.

Mr. HOPKINS: Senator, may I suggest you start reading the conclusion from "X" to "Y"?

The CHAIRMAN: Yes. Here is what he says:

> However, the Parliament of Canada has never assumed legislative jurisdiction in relation to "Marriage" other than in respect of the validity thereof, and there exists no judgment in which was considered the issue of whether, under the heading "Marriage", Parliament has a jurisdiction going beyond the substantial validity thereof.
>
> While it might be argued from the foregoing that the federal jurisdiction is limited as aforesaid—and undoubtedly it would be so argued—my personal view is that the question is still open. I say this because the courts, traditionally, do not decide questions other than the precise one they are called upon to decide. And they have not yet been called upon to decide the broader issue raised by the present bill.
>
> To illustrate this, may I quote from the introductory words of Chief Justice Duff in the *Adoption Reference* (1938) G.C.R. 398, in which several Ontario statutes dealing with adoption, children's protection and deserted wives were held to be within the legislative competence of the legislature of Ontario.
>
> > "We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject

'Marriage and Divorce'. Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside."

In such circumstances, as I have said before, the formulation of a constitutional opinion becomes an exercise in studied speculation; and, in the words of Oliver Wendell Holmes "law is what the courts will do next".

My conclusion therefore is that, since the present bill does not deal in any way with the validity of a marriage contract, there exists a real doubt as to its constitutionality,—a doubt which could be finally resolved only by the Supreme Court of Canada.

That is his conclusion, and I would like to table this opinion so it may be printed in the report that will be made to the Senate.

(For Text of Opinion, See Appendix "E")

Senator POULIOT: I have just a question to ask you, Mr. Hopkins. You say in that opinion you have found no jurisprudence about a similar case.

Mr. HOPKINS: No square judicial precedent.

Senator POULIOT: Are you familiar with a reference of 1912—

Mr. HOPKINS: Yes, I have considered it fully.

Senator POULIOT: —To the Supreme Court of Canada—

Mr. HOPKINS: Yes, I have considered it fully.

Senator POULIOT: —and the Privy Council—

Mr. HOPKINS: Yes, I have considered it fully.

Senator POULIOT: —and what was said by Lord Haldane?

Mr. HOPKINS: Yes, I have it right here in my opinion.

Senator POULIOT: That is very good. If you have it there, do you believe that the summary of the judgment, as reported in Appeal Cases and in Olmsted, gives a good idea of the tenor of the judgment?

Hr. HOPKINS: An excellent idea.

Senator POULIOT: It says:

Under ss. 91 and 92 of the British North America Act, 1867—

Before I go any further, will you please tell me if there is any reference in your notes to this judgment of the Privy Council?

Mr. HOPKINS: I have a full reference to it.

Senator POULIOT: You have a full reference?

Mr. HOPKINS: Yes, Senator.

Senator POULIOT:

...The exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial Legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract.

Mr. HOPKINS: Senator, I quote that in full in my opinion.

Senator POULIOT: Yes. Now we have the B.N.A. Act which says that civil rights are given exclusively to the provincial legislatures, with one exception—well, two exceptions, because there is bankruptcy. But with regard to marriage and divorce it is exclusive, and then there is an exception to the exception for the solemnization of marriage. Do you take it that way, that that is what it said in the judgment?

Mr. HOPKINS: What I would like to say is this, that the words which you quoted from the judgment include the words:

> ...the exclusive jurisdiction *as to its validity* conferred upon the Dominion,...

and those words, I think, are not without significance. This bill does not relate directly or specifically to the validity of marriage; and therein lies the doubt.

Senator FARRIS: It would be a very simple matter for the Government to refer this to the Supreme Court of Canada.

Mr. HOPKINS: May I just quote from the headnote to that case, which clearly indicates what they were considering was whether the ceremony of marriage operated as an exception to the validity of marriage, which was conceded to be within the jurisdiction of the Parliament of Canada. The remaining question is whether "marriage" has a broader meaning than merely legislation with respect to its validity. It was raised in the adoption case by Chief Justice Duff, who said it was not necessary to the decision and he would not deal with the question of whether there might not be some ancilliary jurisdiction of the federal Parliament arising out of validity. But so far as the clear judicial precedents are concerned, it has been left open, and in this case the Privy Council was addressing itself exclusively to the question of validity, and the headnote so indicates.

The CHAIRMAN: I am sorry I have not the quotation here, but there is one judgment of the Supreme Court which was rendered about eight years ago, and not dealing with the validity of marriage, in which one of the judges said that in so far as the civil consequences of marriage are concerned they are exclusively within the jurisdiction of the province. I will find that judgment, and when the committee meets next I will put it before the committee. It was not a matter which was decided by the court, but it was *obiter dictum* by the court at that time, to the effect civil consequences of marriage fall within the jurisdiction of the provinces.

Senator MACDONALD (*Cape Breton*): What court was that?

The CHAIRMAN: The Supreme Court.

Mr. HOPKINS: Mr. Chairman, Senator Pouliot was good enough to give me the headnote to which I referred. It reads as follows:

> . . . the exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction . . .

And here are the words again:

> *as to is validity* conferred upon the Dominion . . .

So I do not think they went beyond that.

Senator POULIOT: Well now, Mr. Hopkins, you will agree that there are similarities and differences between this bill and the bill that was referred to the Supreme Court?

Mr. HOPKINS: Yes.

Senator POULIOT: And the bill that was referred to the Supreme Court was about the solemnization of marriage?

Mr. HOPKINS: Yes, it had to do with validity.

Senator POULIOT: Therefore the question was as to the validity of marriage?

Mr. HOPKINS: That is right, sir.

Senator POULIOT: And it was under the exception to the exception?

The CHAIRMAN: Yes.

Mr. HOPKINS: But it dealt with both.

Senator POULIOT: It dealt with the exception to the exception. It referred to the exclusive powers of the provinces compared with the exclusive powers of the Parliament of Canada. It seems to be contradictory, but when one thinks of it it is impossible not to understand the point. In the reference to the Supreme Court and the Privy Council, it was a bill that was sponsored in the House of Commons regarding the celebration of marriage. And this was a provincial matter.

Mr. HOPKINS: Correct.

Senator POULIOT: And the judgment of the Supreme Court was to the effect that the Parliament of Canada should not encroach upon the rights of the provinces to pass legislation that belonged exclusively to the provinces. I think I have made myself clear.

Mr. HOPKINS: That is quite right.

Senator POULIOT: Now the present legislation which is before the committee is exactly the reverse, and there is no question of the exception to the exception, but it is the exception to the general rule that civil rights belong to the provinces. By the way did you have a look at the original Civil Code?

Mr. HOPKINS: I am not an expert on the Civil Code, although from time to time I have occasion to refer to it.

Senator POULIOT: You know the Civil Code had come into force eleven months before Confederation. It existed at the time of Confederation and therefore it may be presumed that the Fathers of Confederation had seen the code that had been passed before writing the B.N.A. Act or having it passed by the Parliament at Westminster. Don't you think so?

Mr. HOPKINS: It is possible.

Senator BELISLE: May I ask a question? How urgent is it that we pass this bill? The reason I ask this is that as an ordinary layman I must admit I am confused about the opinion given here this morning. Is it not possible to have a final decision by the proper authority?

Mr. HOPKINS: Only by the Supreme Court.

The CHAIRMAN: You could only have a definite opinion from the Supreme Court.

Senator BELISLE: The honourable senator and Mr. Hopkins seem to be well qualified, and there are probably other able senators here who have other opinions, but I am confused.

The CHAIRMAN: Everybody is confused because, as a matter of fact, the Supreme Court has never decided anything on that point.

Senator FARRIS: Mr. Hopkins is doubtful as to whether this is valid or not. I flatter myself that I know some constitutional law, but I wouldn't undertake to give an opinion on that.

The CHAIRMAN: My next point is this: the exercise of jurisdiction is a delicate point at the present time because it has been exercised by the provinces for the last 100 years. That is the way they have exercised the jurisdiction in stating what kind of contract exists in civil marriages between the wife and the husband, and they have dealt with separation of bed and board; they have dealt with the way of the wife getting all that is necessary for the bringing up of the children, and everything that concerns the children. These matters have been dealt with by the Civil Code of the provinces all over Canada for 100 years.

I certainly would not advise the committee that we should pass the bill or amend it at the present or deal with it in any way, except to advise all the attorneys-general of the provinces and ask them if they can come and give their opinion as to what they feel about it.

Now, you know, of course, in this session there will be no time to do that. We have to give reasonable notice to the attorneys-general of the provinces so that they can come before the committee and state their positions on this subject. I was suggesting to the sponsor of the bill that we will deal with the matter this morning, and that will be the end of the committee meetings during this session, because the session will be finished next week. There is no possibility for us to hear the attorneys-general during this session, and then send the bill to the Commons and have it go through. I would like the bill to remain as it is without being reported to the Senate except to say that the committee has not had time, and does not feel they have the time at this point to go through it in this session. If the sponsor wishes to put the bill back for consideration next term, I would advise that he do so very early in the session so that we shall have time to call the attorneys-general and get their opinion about it and then thereafter we shall deal completely with the bill. I think it would be very dangerous for the Parliament of Canada to deal with a matter which has been dealt with by the provincial authorities for 100 years without telling them of our intention to do so and without giving them the option to express their opinion.

That is the feeling I have this morning, and I think the sponsor of the bill, Senator Pouliot, is also willing to have the bill treated in that fashion for the moment. If the committee agrees with me we will have it published in the report that the bill remains as is. It is important to have the opinion of the attorneys-general, and it might be wise to put an end to the bill so far as this session is concerned. It is a very important matter.

Senator STAMBAUGH: I would like to ask a question. Is it not your opinion that this matter would have to come before the Supreme Court of Canada, if we pass it? It does not seem to me there is any doubt that the Province of Quebec, for instance, would take it to the Supreme Court. Having regard to the confusion and difference of opinion among leading constitutional lawyers, I would think it might be as well for us to ask the opinion of the Supreme Court before we finally pass it.

The CHAIRMAN: Don't you have the feeling it would be better if we had the opinions of the attorneys-general of the provinces so that they cannot say that we have dealt with the bill and have referred it to the Supreme Court without consulting their opinion as a whole? I feel it is very important to have the opinions of the attorneys-general of the provinces. They have their own ideas on it. We must remember we have had millions of marriage contracts passed from Confederation until the present time which we might subject to some kind of invalidity, if we were to change the law as proposed in this bill. Before submitting the bill to the Supreme Court, I think we should give a chance to the provinces and if they come to the conclusion that this should be clarified at the federal-provincial conference, and if necessary by amending the B.N.A. Act, they would have an opportunity of doing so.

Senator FARRIS: May I make a motion?

The CHAIRMAN: Yes.

Senator FARRIS: I do this with some hesitation. I can seen my friend is somewhat concerned over this. I would respectfully move that it is the opinion of this committee that any decision on this should be deferred until there has been an opportunity to ask the opinion of and to have a conference with all attorneys-general of the provinces.

Senator POULIOT: I have no objection to that, sir, and I thank you for suggesting it.

The CHAIRMAN: I think it is the best conclusion to which we can come. I would report to the Senate that the bill will remain as is for the present session because we have not the time to deal with it, and that next session we will have more time to deal with the matter in a more complete way.

Motion agreed to.

The CHAIRMAN: Thank you very much, Mr. Hopkins. Your opinion will be printed in the report.

Senator POULIOT: Thank you, Mr. Chairman, and gentlemen.

The committee adjourned.

APPENDIX "E"

DECEMBER 12, 1963.

Mr. Chairman, Honourable Senators:

I have been asked by the Committee for my opinion as to the constitutionality of Bill S-32, An Act to amend the Marriage and Divorce Act. The bill contains only one clause, which reads as follows:—

1. The *Marriage and Divorce Act* is amended by adding, immediately after section 1 thereof, the following section:—

"1A. Married women shall have the same rights as unmarried women for the sale and alienation of immoveable property."

It is simple in form and recites a proposition which has been accepted in principle in the common law provinces. However, it is appreciated that the implications of the bill are serious and that its enactment, if it is constitutional, would have an important impact on a number of provisions in the law of the province of Quebec. In this instance, I take it from the letter of the Deputy Minister of Justice to Mr. Bedard, which forms part of the record, we are not to be accorded the assistance of the Department of Justice. I would be equally happy, at this stage of a busy session, to escape responsibility in this matter. However, it is my official duty to respond to the Committee's request, and I do so now. I simply say, with particular reference to what follows, that I am not an entire Department of Government, but an individual officer of the Senate and that my views are not binding on any one.

The constitutionality of the bill depends, in my opinion, on the construction to be placed on the word "Marriage" as that word appears in Head 26 of section 91 of the British North America Act, 1867. That provision declares, *inter alia,* that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say,—

26. Marriage and Divorce."

And it is added at the end of the said section 91 that

"any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Thus it seems, and here I entirely agree with Senator Pouliot, that federal legislation in respect of any class of subject enumerated in section 91 is paramount. As Lord Watson stated in *Tennant v. Union Bank* (1894) A.C. 31, the legislative powers of the Parliament of Canada "depend upon section 91, and the powers to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights within the province".

On the other hand, section 92 of the same Act provides that in each Province the Legislature "may exclusively make laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated: that is to say,—

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

and

16. Generally all Matters of a merely local or private Nature in the Province."

It will be immediately apparent that the present bill falls within Head 13, and perhaps Head 16, of the said section 92. Accordingly, at least *prima facie,* it would be within the exclusive legislative competence of the provincial legislatures. However, as I have said, if it is nevertheless legislation in respect of "Marriage" as that word is used in the context of section 91, the legislation would fall within the exclusive competence of the Parliament of Canada.

If paramount regard is had to the context, "Marriage" would mean "the substantial validity of marriages"; that is to say, the conditions precedent, other than purely ceremonial conditions, that must be satisfied before a marriage is valid. I say this because the word "Marriage" does not appear in isolation in section 91, but together with the word "Divorce", which latter word connotes the dissolution or invalidation of marriages. This would suggest that "Marriage" might be taken to relate to the establishment or validation of marriages. Moreover, it must be read against "Solemnization of Marriage" in section 92 which would again appear to suggest that whereas the provincial legislatures have jurisdiction over the formal or ceremonial validity of marriages, the federal Parliament has jurisdiction over the substantial validity of marriages. This would give the word "Marriage" a limited meaning and would render the present bill unconstitutional. I am not suggesting that this contextual approach is necessarily conclusive, but it is an approach which might well be taken if the issue were squarely raised before the courts.

As to the importance of the context in the construction of statutory words, see Maxwell on Interpretation of Statutes, 11th Edition, 1962, at pp. 16 to 30, both inclusive.

I now turn to a consideration of the judicial precedents bearing upon this question.

In the Marriage Reference to the Supreme Court in 1912, the issue was simply whether the heading "Marriage" as it appears in section 91 extends to the whole field of validity or whether "Solemnization of Marriage" in section 92 operates as an exception thereto, so that the formal or ceremonial conditions for the validity of a marriage are exclusively a provincial responsibility. The issue was well summarized in the Headnote to the decision of the Judicial Committee appearing in 1912 A.C. at p. 880. It reads as follows:—

> "Under ss. 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial Legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract."

This was also made clear by the argumentation advanced by Messrs. Nesbitt, Lawrence and Lafleur in support of the jurisdiction of Parliament.

It was again clearly expressed by Viscount Haldane, L.C., who delivered the judgment of the Judicial Committee of the Privy Council. His words were:

> "In the course of the Argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by s. 92 to deal with the solemnization of marriage within a province had cut down the effect of the words in s. 91, and effected a distribution of powers under which the Legislature of the province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage."

Other cases have followed the same line.

However, the Parliament of Canada has never assumed legislative jurisdiction in relation to "Marriage" other than in respect of the validity thereof, and there exists no judgment in which was considered the issue of whether, under the heading "Marriage", Parliament has a jurisdiction going beyond the substantial validity thereof.

While it might be argued from the foregoing that the federal jurisdiction is limited as aforesaid—and undoubtedly it would be so argued—my personal view is that the question is still open. I say this because the courts, traditionally, do not decide questions other than the precise one they are called upon to decide. And they have not yet been called upon to decide the broader issue raised by the present bill.

To illustrate this, may I quote from the introductory words of Chief Justice Duff in the *Adoption Reference* (1938) G.C.R. 398, in which several Ontario statutes dealing with adoption, children's protection and deserted wives were held to be within the legislative competence of the legislature of Ontario.

> "We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject 'Marriage and Divorce'. Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside."

In such circumstances, as I have said before, the formulation of a constitutional opinion becomes an exercise in studied speculation; and, in the words of Oliver Wendell Holmes "law is what the courts will do next".

My conclusion therefore is that, since the present bill does not deal in any way with the validity of a marriage contract, there exists a real doubt as to its constitutionality,—a doubt which could be finally resolved only by the Supreme Court of Canada.

E. R. HOPKINS,
Law Clerk and Parliamentary Counsel.